August 4, 2009

Ms. Cheryl Atkinson
Administrator
Office of Workforce Security
200 Constitution Avenue NW
Room S-4231
Washington, D.C. 20210

Dear Ms. Atkinson:

Pursuant to Section 2003(a) of Public Law 111-5 and corresponding UIPL 14-09 and UIPL 14-09, change 1, Illinois submits this application for your certification that we are in compliance with Sections 903(f)(3)(B) and (D) of the Social Security Act (SSA) and thus eligible for our remaining share of UI modernization incentive funds. As you will recall, Illinois has previously been certified as in compliance with Section 903(f)(2). Illinois expects to use the incentive funds primarily if not exclusively for the payment of unemployment benefits, to improve unemployment trust fund solvency, but may use some for administrative costs as authorized by federal law.

Illinois complies with Sections 903(f)(3)(B) and (D) by virtue of a combination of the changes that Public Act 96-30 made to Sections 401 and 601 of Illinois' Unemployment Insurance Act (UIA), *see*, Exhibit A, and the manner in which portions of the UIA not altered by that Public Act have been construed.

In Section 401 of the UIA, as amended by Public Act 96-30, Illinois provides for a minimum dependent's allowance of $15 per week for a dependent spouse and the lesser of 50% of the claimant's weekly benefit amount or $50 per week for one or more dependent children, thus meeting the requirements of Section 903(f)(3)(D).

Section 601B(1) of the UIA, as amended by Public Act 96-30, addresses the conditions set forth in Section 903(f)(3)(B)(ii) of the SSA with regard to situations where the claimant has left work to care for an ill or disabled member of his or her immediate family.

Section 601B(6) of the UIA, as amended by Public Act 96-30, addresses the conditions set forth in Section 903(f)(3)(B)(i) of the SSA with regard to situations where the claimant has left work because of domestic violence.

Pat Quinn, Governor
Maureen T. O'Donnell, Director

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Our language for the domestic violence exception does continue to require that the claimant provide notice to the employer of the reason why he or she has left work. Although Section 903(f)(3)(B)(i) does not expressly include a notice requirement, we respectfully submit that it does not prohibit such a requirement. As a practical matter, given the extraordinary confidentiality requirements that Section 601B(6) imposed even prior to Public Act 96-30, without some notice from the claimant, the employer might not be aware of the reason for the claimant's departure. Moreover, the expectation is that, with notice of the circumstances, the employer will be less likely to protest the claim. Public Act 96-30 expressly eliminated the requirement that the notice be written. Moreover, a prior Department legal opinion concluded that notice did not necessarily have to be provided before the separation and went on to conclude notice would be unnecessary if the employer was already aware of the reason for the claimant's separation. *See,* Exhibit B. Accordingly, while Section 601B(6) reads somewhat differently than Section 903(f)(3)(B)(i), Illinois submits it is at least as beneficial to claimants as the federal language.

Section 601B(7) of the UIA, as amended by Public Act 96-30, addresses the conditions set forth in Section 903(f)(3)(B)(iii)of the SSA.

Even before the enactment of PA 96-30, a claimant discharged due to a "compelling family reason," as defined in Section 903(f)(3)(B), was not subject to the state's misconduct disqualification. That remains the case.

UIPL 14-09, Q&A III-10, notes that state laws which define misconduct as a "willful and wanton disregard of the employer's interests" will generally satisfy the condition that claimants discharged for compelling family reasons cannot be subject to the state's misconduct disqualification. We understand that *Boynton Cab Co. v. Neubeck*, 296 N.W. 636 (1941) is considered the leading case with respect to the meaning of the term misconduct in the unemployment insurance context. Under *Boynton's* willful-and-wanton standard, misconduct can include 1) "deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee," or 2) "carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." *See,* 296 N.W.2d at 640.

Section 602 of the UIA defines "misconduct" as "the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit." Conduct that would be considered misconduct under *Boynton* would not necessarily constitute misconduct under Section 602.

On its face, Illinois' requirement of deliberate and willful conduct sets at least as high a bar regarding mental state as *Boynton's* requirement of deliberate conduct. As opposed to the *Boynton* standard, however, Section 602 expressly rejects the argument that carelessness or negligence alone should be equated with willful and deliberate conduct. S*ee, Messer & Stilp, Ltd. v. Department of Employment Security, et al.*, 2009 WL 1685239 (Ill. App. 1 Dist.); *Wrobel v. IDES,* 344 Ill. App.3d 533 (2003), *attached as Exhibits C and D.*.

A reasonable employer rule governing the performance of work for purposes of Section 602 seems tantamount to "standards of behavior which the employer has the right to expect of his employee." *See, e.g., Ray v. Board of Review,* 244 Ill.App.3d 233 (1993), *attached as Exhibit E* .

Section 602's requirement that the conduct must have harmed the employer or been repeated after a warning establishes an additional hurdle that the *Boynton* standard does not expressly contemplate. Even the willful and deliberate violation of a reasonable employer rule governing the performance of work will not constitute misconduct absent harm to the employer or repetition despite prior warnings.

Administrative precedent cases in Illinois have consistently held that an absence for a compelling family reason does not constitute willful and deliberate misconduct. Some recent examples are attached. In Case No. 09-5483 (6/5/09), *see,* Exhibit F, Illinois' Employment Security Board of Review held a claimant's absence to accompany her minor child at a doctor's appointment did not rise to the level of deliberate and willful misconduct. In Case No. 09-3501 (5/11/09), *see,* Exhibit G, the Board held that the claimant's absence due to the need to care for her ill mother was not a deliberate violation of the employer's rules. In Case No. 09-7323 (7/24/09), *see,* Exhibit H, the Board held a claimant's absence due to "compelling family circumstances" (in that case, the need to care for a sick mother) was not willful and deliberate misconduct.

Moreover, the Board decisions have not been limited to the circumstances contemplated in Section 903(f)(3)(B). In Case No. 08-8408 (9/19/08), *see,* Exhibit I, the Board found that the claimant's absence due to personal marital problems was not established to be a deliberate and willful disregard of the employer's interests.

There are apparently no published appellate court decisions in Illinois that have specifically applied Section 602 to a discharge for a compelling family reason. However, given the perceived similarity of Pennsylvania's and Illinois' unemployment insurance laws in some respects, Illinois courts have looked to Pennsylvania case law for guidance. *See, Messer & Stilp, Ltd., supra.* Doing so regarding discharges for compelling family reasons will support the conclusions reached in the administrative precedent cases. For example, in *Steth, Inc. v. Unemployment Compensation Board of Review*, 742 A.2d 251 ((1999), *attached as* Exhibit J, the court found the claimant had not committed willful misconduct where she missed work for a day in order to accompany a child in her care to the funeral of the child's grandmother and to comfort the child following the funeral.

Finally, the legislative history of P.A. 96-30 makes it clear that the Illinois General Assembly's intent was to meet the conditions for qualifying for the full amount of incentive funding potentially available to the state. *See,* excerpts from legislative testimony and debate, attached as Exhibit K. The fact that the General Assembly did not consider it necessary to amend Section 602 reinforces the idea, as evidenced by the administrative precedents, that the misconduct disqualification was not intended to apply to discharges for compelling family reasons, as defined in Section 903(f)(3)(B).

The foregoing represents the opinion of the Illinois Department of Employment Security's Office of Legal Counsel, and this application is being distributed among agency staff, to advise them of that position.

This is to certify that Public Act 96-30's changes to Sections 401 and 601 of the UIA are currently in effect, the new minimum dependent's allowance in Section 401 will apply to benefit years beginning on or after January 1, 2010, Section 602 of the UIA remains in effect, and none of the provisions discussed here is subject to discontinuation under any circumstances other than repeal by the legislature. I further certify that this application is submitted in good faith, with the intention of providing benefits to unemployed workers who meet the eligibility provisions on which this application is based.

Should you have any questions or require additional information, please contact Joe Mueller, the Department's legal counsel, at 217-785-5069 or Joseph.Mueller@illinois.gov.

Sincerely,

Maureen T. O'Donnell
Director